

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
10

11 ANTHONY GASTON, ) No. CV 10-03511-GAF (VBK)  
12 )  
13 ) Petitioner, ) ORDER SUMMARILY DISMISSING PETITION  
14 ) FOR WRIT OF HABEAS CORPUS FOR LACK  
15 ) OF SUBJECT MATTER JURISDICTION  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

On May 11, 2010, Anthony Gaston (hereinafter referred to as "Petitioner") filed a "Petition for Writ of Habeas Corpus by a Person in State Custody," pursuant to 28 U.S.C. §2254 in the United States District Court for the Central District of California. Petitioner was convicted by a jury in Los Angeles County Superior Court in August of 1994 of murder with a firearm in violation of California Penal Code ("PC") §§187(a) and 12022.5. Petitioner was sentenced to two life sentences, plus 22 years in prison. (See Petition at 2.) Petitioner has raised the following claims in the within petition: "(1) Ineffective assistance of counsel in violation of the Sixth Amendment when trial counsel advised Petitioner to keep hallucinations to self rather than seek psychological evaluation; and (2) Petitioner's due

1 process under the Fourteenth Amendment was violated when new evidence  
2 of bullet lead analysis in connection with belated Brady disclosure  
3 resulted in the conviction of an innocent man." (See Petition at 5,  
4 attached pages 11, 23.)

5 It appears from the face of the Petition that it is directed to  
6 the same 1994 Los Angeles County Superior Court conviction as a prior  
7 habeas petition filed by Petitioner in this Court on March 29, 1999,  
8 in Anthony Gaston v. Anna R. Palmer, Case No. CV 99-03254-NM (Mc).<sup>1</sup>  
9 On March 1, 2000, Judgment was entered in Case No. CV 99-03254-NM  
10 (Mc), denying the petition and dismissing the action without  
11 prejudice, pursuant to the District Judge's Order approving and  
12 adopting the Magistrate Judge's Report and Recommendation.

13 On June 20, 2000, Petitioner filed a "Petition for Writ of Habeas  
14 Corpus by a Person in State Custody" in this Court, entitled Anthony  
15 Gaston v. Gail Lewis, et al., which was given Case No. CV 00-06612-GAF  
16 (JWJ). On July 13, 2001, Judgment was entered denying the Petition  
17 and dismissing the action with prejudice pursuant to the District  
18 Judge's Order Approving and Adopting the Magistrate Judge's Report and  
19 Recommendation. Petitioner filed a "Notice of Appeal." On February  
20 21, 2002, the United States Court of Appeals for the Ninth Circuit  
21 issued an Order granting a Certificate of Appealability on the issue  
22 of whether the District Court properly dismissed the Petition as  
23 untimely. On May 8, 2006, the United States Court of Appeals for the  
24

---

25 <sup>1</sup> The Court takes judicial notice of its own files and  
26 records. See Mir v Little Co. of Mary Hosp., 844 F.2d 646, 649 (9<sup>th</sup>  
27 Cir. 1988). On March 29, 1999, Petitioner filed a "Petition for Writ  
28 of Habeas Corpus by a Person in State Custody," which was given Case  
No. CV 99-03254-NM (Mc). The Petition was dismissed without prejudice  
to Petitioner's right to file a new petition after he exhausted all of  
his state remedies with regard to all of the claims raised therein.

1 Ninth Circuit issued an Order affirming the judgment of the District  
2 Court dismissing the habeas corpus petition as untimely. On August 3,  
3 2006, the United States Court of Appeals for the Ninth Circuit issued  
4 its Mandate affirming the judgment of the District Court.

5 On March 7, 2007, Petitioner filed a "Notice of Motion and Motion  
6 to File Second and Successive Petition," in Case No. CV 00-06612-GAF  
7 (JWJ). On March 27, 2007, a Minute Order was issued advising  
8 Petitioner he must file his request seeking authorization to file a  
9 second and/or successive petition in the United States Court of  
10 Appeals for the Ninth Circuit.

11 On February 2, 2009, Petitioner filed an "Application for Leave  
12 to File a Second or Successive Petition" in the United States Court of  
13 Appeals for the Ninth Circuit. On March 25, 2009, Petitioner filed a  
14 "Request for Leave to File Supplemental Application for Authorization  
15 to File a Second or Successive Petition," in the United States Court  
16 of Appeals for the Ninth Circuit.

17 On June 1, 2009, the United States Court of Appeals for the Ninth  
18 Circuit issued an Order granting Petitioner's request to supplement  
19 his application; however, the Court denied Petitioner's application to  
20 file a second or successive petition on the grounds that Petitioner  
21 failed to make a prima facie showing under 28 U.S.C. §2244(b)(2).

22 The Petition now pending is governed by the provisions of the  
23 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-  
24 132, 110 Stat. 1214)("the Act"), which became effective April 24,  
25 1996. Section 106 of the Act amended 28 U.S.C. §2244(b) to read, in  
26 pertinent part, as follows:

27 "(1) A claim presented in a second or successive habeas  
28 corpus application under section 2254 that was presented in a

1 prior application shall be dismissed unless--

2 (2) (A) the applicant shows that the claim relies on a new  
3 rule of constitutional law, made retroactive to cases on  
4 collateral review by the Supreme Court, that was previously  
5 unavailable; or

6 (B)(i) the factual predicate for the claim could  
7 not have been discovered previously through the exercise of  
8 due diligence; and

9 (ii) the facts underlying the claim, if proven and  
10 viewed in light of the evidence as a whole, would be  
11 sufficient to establish by clear and convincing evidence  
12 that, but for constitutional error, no reasonable factfinder  
13 would have found the applicant guilty of the underlying  
14 offense.

15 (3)(A) Before a second or successive application permitted  
16 by this section is filed in the district court, the applicant  
17 shall move in the appropriate court of appeals for an order  
18 authorizing the district court to consider the application."

19 (Emphasis added.)  
20

21 The Petition now pending constitutes a second and/or successive  
22 petition challenging the same conviction as Petitioner's prior habeas  
23 petitions, within the meaning of 28 U.S.C. §2244(b). Thus, it was  
24 incumbent on Petitioner under §2244(b)(3)(A) to secure an Order from  
25 the Ninth Circuit authorizing the District Court to consider the  
26 Petition, prior to his filing of it in this Court. As noted, on June  
27 1, 2009, the Ninth Circuit issued an Order denying Petitioner's  
28 application for authorization to file a second or successive petition.

1 For the foregoing reasons, **IT IS ORDERED** that this action be  
2 summarily dismissed pursuant to Rule 4 of the Rules Governing Section  
3 2254 Cases in the United States District Courts.

4 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

5   
6

7 DATED: May 28, 2010

\_\_\_\_\_  
8 GARY A FEESS  
UNITED STATES DISTRICT JUDGE

9  
10 Presented this 19th day of  
11 May, 2010 by:

12 /s/  
\_\_\_\_\_  
13 VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE